UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-SAJ
	DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' OBJECTION TO AMENDED SCHEDULING ORDER

Defendants submit this joint Response in opposition to Plaintiffs' Objection to the Amended Scheduling Order at Docket No. 1376 dated November 15, 2007. (Dkt. No. 1470). For the third time, Plaintiffs urge their demand that the Court change the familiar, well-established descriptions of expert report deadlines in the Scheduling Order to the vague and novel designations of "non-relief-related reports" and "relief-related reports." This Court should deny Plaintiffs' Objection, both because the Objection is untimely and because Magistrate Judge Joyner did not abuse his discretion in issuing the Amended Scheduling Order.

I. Procedural Background

Unable to reach agreement on a pretrial schedule, the parties submitted competing proposals to the Court in January 2007. In their submission, Plaintiffs proposed language routinely employed by Magistrate Judge Joyner for expert reports "on injury and causation and all other issues except for damages" and for "damages." (Dkt. No. 1026 at 1.) The Scheduling Order, which adopted Plaintiffs' requested expert report descriptions, issued on March 9, 2007. (Dkt. No. 1075.)

In September 2007, the Cargill Defendants moved to extend and modify the dates in the Scheduling Order. (Dkt. No. 1297.) Prior to the Defendants' motion, Plaintiffs had rejected any

proposal to modify the schedule. In their Response to the Defendants' motion, however, Plaintiffs sought an eight-month schedule extension *and* an unexplained change in the description of the parties' expert reports. (Dkt. No. 1322 at 1.) The Court treated Plaintiffs' Response as a motion to amend. (Order of Nov. 15, 2007: Dkt. No. 1376 at 1-2.)

The Court heard oral argument on the motions on November 6, 2007. After the Cargill Defendants argued the expert-report issue, counsel Scott McDaniel described Defendant Peterson Farms' concerns with Plaintiffs' proposed change in the descriptions of the expert disclosures:

> This question of changing the second benchmark to relief, it concerns me greatly, Your Honor. That's because the plaintiffs both through pleading and through discovery responses have indicated they're pursuing a number of forms of relief. Monetary damage, an order abating the use of litter, an order to remediate the alleged injured natural resources, an order to pay for the costs of replacing alleged injured natural resources, ... possibly an order directing that there be some sort of future study in monitoring in the watershed.
>
> And if you call that second benchmark, Your Honor, anything but damages, I think it's going to create ambiguity where none currently exists at least in the wording of the scheduling order. And you can imagine that the defendants are skeptical of the plaintiff's desire to change it for all these reasons we've described. If that language is employed, as Mr. Ehrich says, does that mean they can produce a natural resource damage assessment or remediation plan and we have a month to respond? If ... the Court adopts their language, if an expert submits an opinion about entirely new litter management protocols different than the laws of the two states, will the defendants only have a month to respond?
>
> So, I would submit to you Your Honor the only thing that makes sense is to limit that second benchmark to what it says and that is monetary damages.

(Nov. 6, 2007 Hrg. Tr.: Dkt. No. 1387 at 176:5 – 177:5.) On November 15, 2007, Magistrate Judge Joyner issued an Amended Scheduling Order denying Plaintiffs' request to alter the respective descriptions of the expert disclosure deadlines. (Dkt. No. 1376 at 2.) Plaintiffs did not file any objection to the November 15, 2007 Order prior to the November 26, 2007 deadline

for such objections. See Fed. R. Civ. P. 72(a) (providing party may file objections to magistrate judge's order within 10 days after being served with the order).

Instead, on December 3, 2007, Plaintiffs moved for reconsideration of the November 15 Scheduling Order. (Dkt. No. 1386.) Despite the fact that every argument that Plaintiffs raised in their reconsideration motion (including the expert report debate) either had been raised or could have been raised in the initial briefing,[1] Magistrate Judge Joyner conducted a full analysis of Plaintiffs' motion. (Order of Jan. 15, 2008: Dkt. No. 1459 at 2.)

The Court carefully explained its refusal to reconsider its original denial of Plaintiff's request to "change the word damages to 'all forms of relief' such that expert reports relating to all forms of relief, such as damages, injunctive relief, abatement orders, monitoring requests, buffer strips and other remedial plans would not be due until current due dates for expert damage reports on January 5, 2009 for Plaintiff and March 2, 2009 for Defendants." (Id.) The Court found:

> Defendants correctly point out that the Court has previously considered and rejected this request after argument by counsel at hearing. Modifications to the scheduling order, which has been relied upon by counsel since its entry on November 15, 2007, should not be made without clear benefit to all parties.
>
> More importantly, the Court finds no substantive reason to grant the request. The Court understands State's arguments for a natural demarcation between relief and causation issues. However, it is equally true that much of the expert work regarding causation will be integrally involved with remediation options. This case was filed June 13, 2005. State's experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for Plaintiff. It is the Court's intention that the very focused area of monetary damages is reserved for the second deadline. Otherwise, unnecessary delay could occur.

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[1] See, e.g., Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (motion to reconsider "is not appropriate to revisit issues already addressed").

(Id. (emphasis added).) On January 25, 2008, Plaintiffs filed their "Objection to the Amended Scheduling Order [Dkt. #1376]." (Dkt. No 1470 at 1.)

II. Argument

The Defendants urge the Court to overrule Plaintiffs' Objection. As a threshold matter, Plaintiffs' Objection to the November 15th Order is untimely by nearly two months. Moreover, to the extent Plaintiffs seek to object to Magistrate Judge Joyner's Order of January 15 (Dkt. No. 1459) denying Plaintiffs' motion to reconsider the expert report deadline issue, the Court should reject the Objection as meritless. The setting of deadlines in a Scheduling Order is subject to the Magistrate Judge's wide discretion, and the denial of reconsideration is reviewed under an exceptionally high standard.

A. The Court Should Not Reach the Untimely Objection.

Plaintiffs' "Objection to the Amended Scheduling Order [Dkt. # 1376]" is untimely and should be overruled. The Rules permit parties 10 days after receiving a magistrate judge's order to file objections. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1). The Rule specifies that "[a] party may not assign as error a defect in the order not timely objected to." Fed. R. Civ. P. 72(a). Notably, Plaintiffs' Objection fails to note this portion of the Rule. (Dkt. No. 1470 at 3.)

Although a district court has the power to entertain the merits of an untimely objection, e.g., Allen v. Sybase, Inc., 468 F.3d 642, 658 (10th Cir. 2006), Plaintiffs here offer no explanation or justification for their late objection to the Order of November 15, 2007, and indeed fail even to acknowledge its lateness. Changes to scheduling orders are by their nature especially time-sensitive. Underscoring the unfairness of now modifying critical dates in the schedule for the sole benefit of Plaintiffs, Magistrate Judge Joyner noted that the Amended Schedule "has been relied upon by counsel since its entry on November 15, 2007, [and] should

not be [modified] without clear benefit to all parties." (Order of Jan. 15, 2008 at 2.) Particularly because Plaintiffs seek eleventh hour changes to the scope of expert disclosures identical to those Plaintiffs themselves originally proposed, this Court should refuse to consider their late Objection.

B. Magistrate Judge Joyner Did Not Abuse His Discretion in Retaining the Original Descriptions of Expert Disclosures in the November 15 and January 15 Orders.

Turning to the merits, Magistrate Judge Joyner did not abuse his discretion in using the same descriptions for expert disclosures in the Amended Scheduling Order of November 15, 2007 and the Order of January 15, 2008 that Plaintiffs had suggested and that the Court had adopted in the original Scheduling Order (Docket No. 1075).

In ruling on an objection, a district court is "required to defer to the magistrate judge's ruling unless it was clearly erroneous or contrary to law." Allen, 468 F.3d at 658 (quoting in part Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir. 1997)). In applying the clearly erroneous standard, "the reviewing court must affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. (quoting in part Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1464 (10th Cir. 1988)). Plaintiffs insist that the Amended Scheduling Order's expert reporting categories are "clearly erroneous because [they] fail to take into account that in an environmental pollution case such as this, it is necessary to characterize the injury suffered before the full range of appropriate relief can be determined," a "failure" that Plaintiffs characterize as a clearly erroneous factual finding. (Dkt. No. 1470 at 1, 3.) However, Magistrate Judge Joyner's Orders of November 15, 2007 and January 15, 2008 made no findings of fact now subject to review under the clearly erroneous standard, and Plaintiffs' only cited case law – regarding factual record support – is not helpful. (Id. at 3.)

What Magistrate Judge Joyner actually did was exercise his discretion on a pair of procedural matters: when the parties must disclose various types of expert evidence and whether Plaintiffs had offered a compelling new reason to change the Court's original decision on those deadlines. It is important to note that Plaintiffs' objection would not change the substance of the information the parties are required to disclose; Rule 26 will still require the disclosure of all of the same information about all the same witnesses. The only issue raised by Plaintiffs' objection is *when* the parties must make those disclosures.

Magistrate judges are given "wide latitude" in setting schedules, and a refusal to modify a scheduling order is reviewed for abuse of discretion. See Burks v. Okla. Publ. Co., 81 F.3d 975, 979 (10th Cir. 1996) (appellate court review of district court's refusal to modify scheduling order). The control of discovery, and specifically whether to extend discovery deadlines, are strictly matters of court discretion. Rodriguez v. IBP, Inc., 243 F.3d 1221, 1230 (10th Cir. 2001); Smith v. United States, 834 F.2d 166, 169 (10th Cir. 1987). Hence, even where a party makes the necessary showing of good cause to modify dates within a pretrial schedule, Rule 16 leaves the decision on modification to the Magistrate Judge's discretion. Fed. R. Civ. P. 16(b)(4).[2] With respect to the January 15 Order, the fact that Plaintiffs' underlying motion sought reconsideration further counsels restraint in this Court's review. In the Tenth Circuit, reconsideration is disfavored and narrowly applied, and a decision denying reconsideration should be overturned only if it was "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." Wright v. Abbott Labs., Inc., 259 F.3d 1226, 1236 (10th Cir. 2001).

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[2] "A magistrate judge's scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Luigino's, Inc. v. Pezrow Cos., Inc., 178 F.R.D. 523, 535 (D. Minn. 1998).

Magistrate Judge Joyner's decision to retain standard expert-report descriptions and to reject Plaintiffs' last minute attempt to redefine the scope of the parties' expert reports is sound and fully within his discretion. Despite their contention that Magistrate Judge Joyner's decision constitutes "clear error," Plaintiffs fail to direct the Court to a single case—environmental or otherwise—that actually employs their proposed expert-disclosure scheme. The Court did not abuse its discretion in using familiar, unambiguous language in its Scheduling Orders (old and new) rather than Plaintiffs' vague and untested alternative. Nor was the Court's decision not to reconsider its use of the standard language "arbitrary, capricious, whimsical, or manifestly unreasonable." See Wright, 259 F.3d at 1236.

In addition, as noted above, the question is not *whether* Plaintiffs must make non-damages relief-related expert disclosures, but *when*: in April 2008 or in January 2009. Magistrate Judge Joyner noted fairness problems with Plaintiffs' request to postpone their non-damages relief reports until January 2009. In the underlying arguments, Defendants noted that Plaintiffs' proposed regime would mean that Plaintiffs could wait to produce (for example) a CERCLA remediation plan, a natural-resource-damages (NRD) assessment, or an opinion about entirely new proposed litter management protocols until January 2009. (Dkt. No. 1387 at 176:5 – 177:5; Dkt. No. 1422 at 6.) Magistrate Judge Joyner also observed that the parties had already "relied upon" the deadlines using the standard language, and reasonably found that so drastically altering the scope of expert report deadlines now could result in "unnecessary delay." (Order of Jan. 15, 2008 at 2.) The Court concluded that Plaintiffs had already enjoyed ample time – nearly three years – for their experts to prepare their opinions:

> More importantly, the Court finds no substantive reason to grant the request. .... This case was filed June 13, 2005. State's experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for Plaintiff.

(Id.)

In denying reconsideration of the request, the Court pointedly found: "Modifications to the scheduling order ... should not be made without clear benefit to all parties.." (Id.) Accordingly, the Court carefully "inten[ded] that the very focused area of monetary damages is reserved for the second deadline." (Id.) Rejecting a modification that would benefit only Plaintiffs while causing prejudice and undue hardship to Defendants and delay in the litigation does not constitute an abuse of discretion by the Magistrate Judge, nor, again, was the Court's denial of reconsideration of this issue ground "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." See Wright, 259 F.3d at 1236.

Plaintiffs now suggest that an April 1, 2008 deadline is somehow impossible for them to achieve. However, Plaintiffs have known since at least March of 2007, when the Court included Plaintiffs' requested "damages expert" language in the original scheduling order (Dkt. No. 1026 at 1), that their experts would need to complete whatever analysis and work was necessary to opine on everything but damages by the *first* expert deadline. Moreover, Magistrate Judge Joyner noted that, although he appreciated Plaintiffs' two-step analysis argument, "it is equally true that much of the expert work regarding causation will be integrally involved with remediation options." (Order of Jan. 15, 2008 at 2.) The Court's ruling that Plaintiffs' experts should be able to meet the April 1, 2008 deadline for their expert reports on all issues except damages, particularly given Plaintiffs' long notice of that deadline, was reasonable and not clearly erroneous.

It also bears remembering that until the Cargill Defendants moved to modify the schedule in late September 2007, Plaintiffs had refused to agree to any schedule changes. At that time, Plaintiffs' expert reports on all issues but damages was due December 3, 2007. Only in

responding to the motion on October 15 did Plaintiffs raise for the first time their request for a "non-relief related report" deadline and their request to push that deadline (under whatever name) well into 2008. If the issue of "non-relief-related" experts were really so critical to Plaintiffs' ability to fairly present their case, Plaintiffs logically would have sought relief sooner than a brief six weeks before the first expert disclosure deadline was to run. The nature of the expert report deadlines has not changed since the original scheduling order was entered in this case, and Plaintiffs offer no sustainable reason to overturn Magistrate Judge Joyner's discretionary decision not to change the fundamental nature of the expert reports just as Plaintiffs' deadline is approaching.

Magistrate Judge Joyner reasonably found that Plaintiffs' "experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008." (Order of Jan. 15, 2008 at 2, emphasis added.) Defendants urge this Court to reject Plaintiffs' Objection and to affirm Plaintiffs' obligation to abide by this Court's Amended Scheduling Order.

III. CONCLUSION

The Defendants urge the Court to deny Plaintiffs' objection as untimely and without merit. Magistrate Judge Joyner's Amended Scheduling Order did not abuse his discretion, nor was the Court's denial of reconsideration arbitrary, capricious, whimsical, or manifestly unreasonable. Thus, the Court should deny Plaintiffs' "Objection to the Amended Scheduling Order [Dkt #1376]" of November 15, 2007.

Respectfully submitted,

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